Index

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ET AL., *Petitioners*

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., ET AL., *Respondents*

Amicus Curiae Brief in Support of Reversal

AMICUS CURIAE BRIEF

LOWER COURT OPINIONS

The opinion of the U. S. Court of Appeals is reported as *Tillman* v. *Wheaton-Haven Recreation Association, Inc.*, 451 F. 2d 1211 (4th Cir. 1971). The opinion of the District Court is unreported.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the U.S. Court of Appeals was entered on October 27, 1971. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was duly filed, but was denied by the U.S. Court of Appeals on December 16, 1971. Review was granted by this Court, 40 U.S.L.W. 3537 (U.S. May 16, 1972).

INTEREST OF AMICUS CURIAE STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS

The issue raised in these proceedings involves the nature of a Maryland community swimming pool under the application of the federal public accommodations law. The State of Maryland has enacted an identical public accommodations law which provides *inter alia:*

> It is unlawful for an owner or operator of a place of public accommodations . . . because of the race . . . of any person, to refuse, withhold from, or deny to such person any of the accommodations, . . .
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> * * * *
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> For the purpose of this subtitle, a place of public accommodation means:
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> * * * *
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;
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> * * * *
>
> The provisions of this section shall not apply to a private club or other establishment not in fact open to the public . . . MD. ANN. CODE art. 49B, § 11 (1972 Repl. Vol.).

The agency authorized by law to enforce these provisions is the State of Maryland Commission on Human Relations and is represented by its general counsel in all judicial proceedings. MD. ANN. CODE art. 49B, § 2. (1972 Repl. Vol.).

Community swimming pools operate in Maryland in substantial numbers. Most voluntarily comply with the aforesaid provisions of state law and do not discriminate in either membership or guest policies on

the basis of race. There are, however, a very few which promote racially discriminatory membership or guest policies which are now under investigation by the State Commission. Affirmation of the lower court's decision would have an adverse impact upon cases presently before the State Commission as well as a consequential effect upon those pools presently maintaining compliance with the State public accommodations law they believe to cover their operations.

AMICUS CURIAE AUTHORITY

The State of Maryland Commission on Human Relations, a duly constituted agency of the State of Maryland, files a brief *amicus curiae* in these proceedings pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. The Commission has obtained the consent of all parties to file a brief *amicus curiae.*

QUESTION PRESENTED

Whether a community swimming pool open to the surrounding white community and without any articulated membership standards is a private club and, hence, exempt from the public accommodations law (42 U.S.C. § 2000a) which prohibits racial discrimination.

STATUTE INVOLVED

The statutory provision involved is Title II of the Civil Rights Act of 1964, 78 Stat. 243 (1964), 42 U.S.C., Sec. 2000a (1970), which provides, *inter alia:*

> "(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on

the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

* * *

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

* * *

Operations affecting commerce; criteria; "commerce" defined

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or

there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

Support by State action

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by Officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

STATEMENT

The Petitioners instituted suit in Federal District Court (Civil Action No. 21294), Maryland District, against Respondents for violation of the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) and Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a).

The Respondents are Wheaton-Haven Recreation Association, Inc., hereinafter "Wheaton-Haven", a Maryland corporation, and thirteen individuals who have been or are now officers and directors of Wheaton-Haven. The case was heard on cross motions for Summary Judgment, and Petitioners' Motion for Preliminary Injunction. On July 8, 1970, the District Court (Northrop, D. J.) rendered an opinion in favor of the Respondents, finding that Wheaton-Haven was operated as a private club and was therefore exempt from the purview of the aforementioned federal laws. The Court of Appeals (Haynsworth, Boreman, Butzner, J.J.) affirmed the judgment of the District Court with one judge dissenting. Rehearing was denied, with Judges Winter and Craven joining the dissent from the denial of the petition. The Petitioners then petitioned for and were granted a Writ of Certiorari to the Supreme Court of the United States.

The federal suit was instituted after the Montgomery County Commission on Human Relations, though its Panel on Public Accommodations declared Wheaton-Haven to be a public accommodation under County law and not entitled to an exemption as a private club. Enforcement of the Commission's cease and desist order is presently awaiting Maryland State court action.

Wheaton-Haven is a non-profit Maryland corporation created in 1958 for the purpose of operating a "community swimming pool" in an area of Silver Spring, Montgomery County, Maryland.[1] The Re-

[1] The facts are based on the findings below supplemented where indicated by the Findings of Fact of the Montgomery County Human Relations Commission as set forth in *Tillman, et al. v. Wheaton-Haven Recreation Association*, No. P.A.-6, June 3, 1969, I RACE REL. L. SURVEY 231 (1970), and Appendix.

spondent operates exclusively as a community swimming pool and conducts no social functions, (A. 5). The pool was constructed by a Virginia building contractor after a special exception was granted for construction of the facility by the Montgomery County Board of Appeals. The special exception was granted pursuant to a zoning ordinance classifying community pools as a special exception to the general zoning ordinance. MONTGOMERY COUNTY, MD., CODE § 107-28(Z)(4)(1965) (A. 3). The Council stated in support of the special exception ordinance, "Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development." MONTGOMERY COUNTY, MD., CODE § 111-37(n)(1965) (A. 4). On August 13 and August 23, 1958, the Board of Appeals conducted public hearings on Case No. 656, Respondent's application for a special exception. At the hearings, the Respondent's witnesses testified that the Respondent was attempting to serve the imperative recreational needs of the community which the County had been unable to fulfill. The Respondent asserted that the pool was needed as a deterrent to juvenile delinquency, that the pool would not be used for social functions, and that the construction of the pool would be to the benefit of the community at large (A. 4).

In order to meet the requirement that sixty (60) per cent of the projected construction costs were obliged or subscribed, Wheaton-Haven conducted an extensive door-to-door membership drive in the surrounding neighborhoods and communities which at that time were all white. Advertising was a part of the campaign in those communities (A. 4). Charter member-

ships were solicited in the form of twenty dollar ($20.00) pledges, and no other qualifications for membership were required. Respondent also conducted a promotional meeting in the Civic Auditorium of the Maryland-National Capital Park and Planning Commission (A. 4). The requisite costs were met and the special exception was granted.

The pool presently charges a $375 initiation fee and annual dues of $50-$60. Under the by-laws, membership is open to bona fide residents of the area within a three-quarter mile radius of the pool. Up to thirty per cent of the membership may come from the public at large outside this area. Applicants for membership must be approved by an affirmative vote of a majority of those present at a regular meeting of the membership, a regular meeting of the Board of Directors, or a special meeting called for that purpose.

Membership is not personal but is by family units (A. 6), and though it is limited in the by-laws to 325 families, membership has actually been held at approximately 260 families for several years. Before 1964, interviews with prospective applicants were not conducted, and the interview procedure which was then initiated was for the sole purpose of observing the race of the applicant (A. 5-6). No social or business information is gathered at the interview (A. 5-6). If a member sells his property, the purchaser has the first option to purchase the vacant membership in the pool. Though the community was integrated by 1967 (A. 6), no Negroes have ever been accepted to membership. Wheaton-Haven's records show that only one white family has been denied membership during Wheaton-Haven's entire history.

Ostensibly only members and their relatives are admitted to the pool, and members of the general public cannot gain admittance by payment of an entrance fee.

Wheaton-Haven pays state and local real estate taxes, but is exempt from state and federal income taxes under MD. ANN. CODE art 81, § 288(d)(8) (1969 Repl. Vol.) and INT. REV. CODE OF 1954, § 501(c)(17), both of which exempt non-profit, member-owned and controlled recreational facilities. In the summer of 1964, the Respondent refused to allow both integrated swimming teams and black babysitters to use the facilities (A. 6).

Dr. and Mrs. Harry Press, two of the Negro Plaintiffs, own a home within the three-quarter mile radius of the pool. The previous owner of the home was not a member of the pool and therefore had no interest in the pool to transfer. In the spring of 1968, however, Dr. Press requested an application for membership in the pool from members of the pool's Board of Directors. Wheaton-Haven refused to furnish him with such an application. The stipulated reason for not sending the Press family an application was that they are black.

Mr. and Mrs. Murray Tillman have been bona fide members of Wheaton-Haven since 1965. Around July 19, 1968, the Tillmans, who are white, brought Grace Rosner, a Negro woman, to the pool as a guest. On July 20, 1968, Wheaton-Haven promulgated a rule that limited guests to relatives of members. On July 24, 1968, and at all times since that date, Wheaton-Haven has refused to permit the Tillmans to bring Mrs. Rosner to the pool as a guest.

SUMMARY OF ARGUMENT

Under Title II of the Civil Rights Act of 1964, 78 Stat. 243 (1964), 42 U.S.C. § 2000a (1970), Wheaton-Haven Recreation Association, Inc. is a public accommodation which cannot discriminate on the basis of race. Wheaton-Haven's non-private character is revealed by an examination of four areas of the pool's history and structure; the exclusivity of membership, the purpose of the organization, public solicitation and public service. The facility's claim of private club status is specious since in fact Wheaton-Haven is open to white families within a certain geographic area, the only genuine basis of selectivity being that of race. Wheaton-Haven serves no social civic or fraternal purpose other than providing a facility to whites interested in swimming. The promoters of the facility engaged in public solicitation when it was established in 1958 and continued to do so until 1968. Wheaton-Haven has represented to Montgomery County that it would be a public benefit to the community at large by satisfying the imperative recreational needs of the community in lieu of a county-built facility. The organization has therefore assumed a community obligation which it may not subvert by donning a cloak of privacy.

ARGUMENT

A COMMUNITY SWIMMING POOL, OPEN TO WHITE FAMILIES RESIDING IN THE SURROUNDING COMMUNITY, IS NOT ENTITLED TO AN EXEMPTION FROM FEDERAL CIVIL RIGHTS LAWS AS A PRIVATE CLUB.

I. Introduction

Community swimming pools are a post World War II creature of affluent suburbia. In Maryland these pools have appeared within the past twenty years principally in the Baltimore-Washington suburbs both

in new housing subdivisions and older more established communities. A glance at the newspapers' real estate sections in these metropolitan areas quickly reveals the important sales advantages that access to a community pool entails.

While community pools may differ somewhat in size, manner of operation and organizational formalities, they are all similar in their public function; providing a recreational facility for a defined community. The common denominator for membership in all such pools is the interest of nearby homeowning families in swimming. The pools differ from country clubs in that they lack any social or fraternal characteristics. Most if not all of these pools were constructed by neighborhood homeowners because suburban governments could not and did not respond to requests to provide these recreational facilities during an era of unprecedented population growth. *Hearing on H.R. 7125 Before the Finance Committee,* 85th Cong., 2d Sess. (July 15, 16, 17, 1958). In Maryland, both state and local governments encouraged development of such pools. MD. ANN. CODE art 81, § 288(d)(8) (1969 Repl. Vol.); MONTGOMERY COUNTY, MD., CODE § 107-28(Z)(4) (1965).

The public policy of Maryland condemns racial discrimination in housing, employment and public accommodations. MD. ANN. CODE art 49B, § 1 *et seq.* (1972 Repl. Vol.). State commerce has benefited from this policy by attracting national businesses and their employees to Maryland and allowing all persons regardless of race to enjoy its abundance.

Most Maryland county pools have voluntarily submitted to state and local anti-discrimination laws.

Wheaton-Haven, operating as a haven for whites only, is an exception to this distinguished civic record.

Affirmation of the lower court will leave black Maryland home buyers in a quandary. While Maryland encourages full participation of blacks in all forms of community life, in order to do so blacks must carefully choose a home in a community with a recreational facility identical to that in *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969), and not one of Wheaton-Haven's character. The fact that black home buyers face this dilemma is contrary to the public policy of Maryland.

Application of existing legal principles demonstrates that Wheaton-Haven is not entitled to an exemption as a private club under anti-discrimination laws, federal, state or local.

II. Private Club Exemption

There is no single test which may be invoked to establish whether a recreational facility is a public accommodation or a private club. Rather, a number of factors must be considered. These factors must be weighed in light of the "private club" exemption recited in Title II Civil Rights Act of 1964, 78 Stat. 243 (1964) 42 U.S.C. § 2000a(e) (1970) which protects only the *"genuine privacy* of private clubs . . . whose membership is genuinely *selective* . . ." 110 CONG. REC. 13697 (1964) (remarks of Senator Humphrey) (emphasis added).

Wheaton-Haven possesses the burden of proving its private club status, *United States* v. *Richberg,* 398 F. 2d 523 (5th Cir. 1968); *Nesmith* v. *YMCA,* 397 F. 2d 96 (4th Cir. 1968). The record shows conclusively that since its inception, Wheaton-Haven has provided

a public function and has never been private. The facts revealed to the Montgomery County Commission on Human Relations, *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, No. P.A.-6, (Montgomery County, Maryland, Commission on Human Relations, June 3, 1969), show that at its nascence, and throughout its existence, Wheaton-Haven has held itself out to be a public facility serving the imperative recreational needs of the immediate community. It was not until recently that the club insisted upon its private character solely for the purpose of preserving the right to discriminate against blacks who were members of the tax paying public the organization had promised to serve.

It is true that for many years, even before the passage of federal, state and local anti-discrimination laws, Wheaton-Haven possessed many characteristics that it now contends give it private club status. The nonprofit corporation has by-laws, a board of directors who are required to be members, applications for membership, initiation fees and yearly dues, geographical limitations on membership, guest rules and a ban on public admission. However, examination beyond these superficial characteristics of the operative nature of the Respondent discloses Wheaton-Haven's essential non-private character.

For example, emphasis was placed by the lower court upon the fact that Wheaton-Haven is "owned, operated and controlled entirely by its members" and that "regular membership meetings are held, and membership participation is strikingly high." *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 451 F. 2d 1121 at 1220. However, member-government was insufficient to establish private club status in either

Sullivan v. *Little Hunting Park, supra,* or *Bell* v. *Kenwood Golf and Country Club,* 312 F. Supp. 753 (D. Md. 1970).

In 1964, after six years of operation, Wheaton-Haven began to adopt additional characteristics of a private club. Wheaton-Haven began to interview applicants in 1964 (A. 5). Also in 1964, Wheaton-Haven refused to allow integrated swimming teams to compete at or use its facilities (A. 6). Again in 1964, Wheaton-Haven stopped permitting black baby sitters to accompany member children to the pool (A. 6). In 1968 Mrs. Rosner, a black guest of Mr. and Mrs. Tillman was allowed to use the pool. A short time later Wheaton-Haven promulgated a rule limiting guests to relatives of members. Since July 24, 1968, the Tillmans have not been allowed to bring Mrs. Rosner into the facility.

Dr. and Mrs. Press, requested an application in the spring of 1968 and were refused because of their race.

Clubs which are organized solely for the purpose of avoiding the law are considered sham organizations. *Daniel* v. *Paul,* 395 U.S. 298 (1969); *United States* v. *Richberg, supra; Bell* v. *Kenwood Golf and Country Club, Inc., supra; United States* v. *Jordan,* 302 F. Supp. 370 (E.D. La. 1969).

The creation of sham "clubs" was discussed at lengths during the Senate debates on the 1964 Civil Rights Act. Senator Humphrey stated the following in reply to a question concerning the possibility of abuse of the private club exemption,

> If a club were established as a way of bypassing or avoiding the effect of the law that kind of a club would come under the language of the bill. S. Rep. No. 110, 88th Cong. 2nd Sess.—6008 (1964).

The congressional disapproval of sham clubs is clear and has been repeatedly found unlawful.

In *United States* v. *Clarksdale & Anderson Co.*, 288 F. Supp. 792 (N.D. Miss. 1965), a restaurant adopted private club trappings. The court found the only qualifications for membership in the alleged club to be nominal entrance fees and white skin. It was held that the organization was a sham club open only to whites. Wheaton-Haven fares no better under these principles.

III. Genuine Selectivity

Wheaton-Haven has failed to establish the "plan or purpose of exclusiveness" characteristic of a purely private club. *Sullivan* v. *Little Hunting Park, supra,* at 236 (1969). Rather, membership has traditionally been open to white residents within a defined geographical area, there being no selective elements other than race. Several considerations show the non-exclusive nature of Wheaton-Haven.

A. *Exclusivity:* The opinion below also held, "the final test, and one of the more important ones, is the test of exclusivity." 451 F. 2d at 1220. This Court has held that a pool remarkably similar to Wheaton-Haven was neither private nor exclusive. In so holding, the Court stated,

> The Virginia trial court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographical area, there being no selective element other than race. *Sullivan* v. *Little Hunting Park,* at 236 (1969).

Nevertheless, the lower court saw an element of selectivity in the rejection of one white man in Wheaton-Haven's entire history. The extra record consideration of other rejected whites is contradicted by Wheaton-Haven's own admission. Normally, truly private clubs reject a significant proportion of applicants, and a low rejection ratio by an alleged private club is usually fatal to a claim for the private club exemption. In *Nesmith* only five applicants were rejected out of 1300 in one year; in *Stout* v. *YMCA*, 404 F. 2d 687 (5th Cir. 1968), of 3070 membership applications in one year only four were rejected; in *United States* v. *Jordan*, not one of 2400 applications for memberships were rejected; and in *Bell* v. *Kenwood Golf and Country Club, Inc.*, "substantial majority" of applicants was accepted.

The lower courts also saw the interviewing of prospective members as an element of selectivity. In fact, the Wheaton-Haven *did not conduct interviews* before 1964. The interview procedure which now exists is a cursory one designed to physically observe the color of the applicants' skin (A. 5-6). No social, formal or business background information is gathered. If an applicant lives within the three-quarter mile limit, he does not need the recommendation of a present member of Wheaton-Haven.

Lastly, the lower court states that the initiation fees and yearly dues have a selectively burdensome effect on members of the community which creates an automatic standard for the social and financial status of applicants. This is an empty criterion in two respects. First, the area in which Wheaton-Haven is located is one in which a $375 initial fee and annual dues of $50-60 are not "substantial" or "heavy" investments.

Montgomery County is one of the most affluent in the country. Second, similar facilities have been found non-private despite "substantial" fees. *Sullivan* v. *Little Park, supra.* In *Bell* v. *Kenwood Golf and Country Club* initiation fees were $600-1,500, and annual dues were $23-38; and in *Clover Hill Swimming Club* v. *Goldsboro,* 47 N.J. 2d 596, 219 A. 2d 161 (1966) new members were required to pay a $350 debenture bond and a yearly fee of $150. Virtually all community swimming pools involve "substantial" initiation fees and annual dues.

The lower court acknowledged that Wheaton-Haven was unable to produce clear, precise and unmistakable standards for membership. However, the lower court glossed over the lack of selectivity in Wheaton-Haven's membership policy and falls back on the assurance that Wheaton-Haven is "not in fact open to the public," a conclusion which the very lack of exclusivity or selectivity belies. Wheaton-Haven fails here at the crucial test; that of selectivity. The membership is, in effect, open to white families residing in the community. Its "private" label is merely an artificial barrier thrown up to justify the rejection of black members of the community.

B. *Purpose of the Organization:* The statutory exemption for distinctly private organizations is designed to protect the personal associational preferences of their members. *United States* v. *Richberg, supra; Clover Hill Swimming Club* v. *Goldsboro, supra.* However, Wheaton-Haven does not owe its existence to the associational preferences of its members but to the coincidence of their common interest in the swimming pool offered to the community for its enjoyment. *In re Holiday Sands, Inc.,* 9 RACE REL. L. REP. 2025 (1964).

Generally private clubs have some goal, purpose or interest aside from exclusion of other members of society. It is often considered that a private club must have a civic, fraternal or social purpose. *Moose Lodge No. 107* v. *Irvis*, 40 U.S.L.W. 4715 (U.S. June 12, 1972); *United States* v. *Richberg, supra.* Wheaton-Haven's only purpose is to provide swimming facilities for the nearby white community. There are no social functions held at the facility to increase intimacy or association between members (A. 5). The fact that membership is not personal but runs to a family unit underscores Wheaton-Haven's non-social nature. Indeed, at the zoning hearings concerning Wheaton-Haven's application for a special zoning exception, Wheaton-Haven's witnesses testified that the pool was not intended to be used for private social functions (A. 4). It seems, therefore,

> that where a club has a membership which . . . is *not limited to intimate relationships,* which *draws no line other than race,* which *counts among its membership . . . the "general public,"* it cannot be called a "private club." It is, in fact, merely a building which houses the general *white public which has gathered together for a particular activity,* an activity which for some reason, cannot be shared with members of a minority group or race merely because of their physical features. Comment, *Current Developments in State Action and Equal Protection of the Law,* 4 GONZAGA L. REV. 233, at 272 (1969). (Emphasis added).

In view of these facts, the Respondent can find little comfort in the fact that Wheaton-Haven is a non-profit corporation. Courts will not enjoin discrimination motivated by profit and then allow discrimination for charity. *Williams* v. *Rescue Fire Co.*, 254 F. Supp. 556 (D. Md. 1966).

C. *Public Solicitation:* The opinion below held that Wheaton-Haven does not "publically solicit members." 451 F. 2d at 1220 (1971). This is a misleading conclusion. During 1958, when Wheaton-Haven was required to meet county zoning requirements by demonstrating that sixty (60) percent of construction costs were obligated or subscribed, an extensive membership drive was conducted (A. 5). Circulars were distributed to the communities surrounding the proposed pool site (A. 4). Door-to-door solicitations of these communities were also conducted, the *only* qualification for charter membership then being the ability to pay a minimum twenty dollar ($20) pledge (A. 4). At that time no county, state or federal antidiscrimination laws were in existence. Since that time and until 1968 a sign hanging conspicuously outside the pool gave the telephone number of the membership chairman, and served as an open invitation to membership to those living in the surrounding communities (A. 6). During this period it was common knowledge in the community that pool membership was open to all in the surrounding white community (A. 6). While Wheaton-Haven is not a pool open to the public at large, in the sense of the facility in *Daniel* v. *Paul,* it is, as are all community pools, open to those living in a limited geographic area and in this sense, is indistinguishable from the facility in *Sullivan.*

D. *Public Service:* Though the opinion below held that Wheaton-Haven's "members are not limited to, nor does it purport to serve all of, the 'general public' in any recognizable community," 451 F. 2d at 1219, this conclusion does not square with the fact that thirty per cent of the members may come from outside a three-quarter mile radius from the pool, and only one

white family within the defined area has ever been rejected. Rather than serving a select group of people, chosen by some articulated standards, Wheaton-Haven extends its benefits to the white population which lives within a specific radius. This has the effect of enhancing the value of homes located therein. Likewise any formal or actual ceiling membership is correlated only to the facility's physical capacity for use and does not constitute any demonstrable element of selectivity. *Castle Hill Beach Club* v. *Arbury, N. Y.*, 2 N.Y. 2d 596, 162 N. Y. S. 2d 1, 142 N.E. 2d 186 (1957) The facilities of all accommodations, public and private, are limited in the number of persons who can be effectively and efficiently served, and this limitation does not change an otherwise public accommodation into a private one *Clover Hill Swimming Club* v. *Goldsboro, supra.* The facility in *Sullivan* had similar provisions and this Court rejected the Virginia court's designation of the club as private.

This Court recently declared that a characteristic of a public accommodation is that it be

> located and operated in such surroundings that although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the state.

Moose Lodge No. 107 v. *Irvis, supra* at 4719. Unlike Moose Lodge, "ostentatiously proclaiming the fact that it is not open to the public at large," Wheaton-Haven has purported to serve imperative recreational needs of the community which have not been fulfilled by the government. In order to qualify for a special zoning exception, the promoters of the pool testified that the pool was needed to deter juvenile delinquency in the community and was meant to be a public benefit to the

community at large. The image that the Wheaton-Haven founders created was that of a group of concerned neighbors trying to meet the recreational needs of the community by financing and maintaining facility in lieu of a county-built facility (A. 4). Wheaton-Haven therefore took upon itself a responsibility to the community, and upon these representations the special zoning exception was granted (A. 4).

Wheaton-Haven chose its status as a community pool over another existing but more stringent zoning category designated as "private club." MONTGOMERY COUNTY, MD., CODE § 111-37(n) (1965). The County government encouraged the development of community pools under this zoning classification (A. 3-4). In addition, as a community pool Wheaton-Haven gained state and federal tax exemptions. INT. REV. CODE OF 1954, § 501(c)(17); MD. ANN. CODE Art 81, § 288(d)(8) (1969 Repl. Vol.).

In 1962 the Montgomery County Council declared that swimming pools were public accommodations subject to the County's anti-discrimination laws, MONTGOMERY COUNTY, MD., CODE § 77-1 *et seq.* (1965). At the time this law was enacted there were no government owned or operated swimming pools in Montgomery County. There were, however, forty-three (43) community pools, including Wheaton-Haven (A. 9).

To label Wheaton-Haven—and inferentially similar pools—private in light of the fact that the promoters, the community, and the Montgomery County government all regarded Wheaton-Haven as a non-private community facility, is to subvert the needs of the community, Wheaton-Haven's community obligation, the public policies of Montgomery County, the State of Maryland and the United States.

CONCLUSION

Therefore, because the members of Wheaton-Haven do not in fact control membership through recommendation, selection and revocation procedures; because the number of members is limited only by the capacity of the facility and there are no genuinely selective qualifications for membership other than race and because Wheaton-Haven's birth was due to its "billing" as a public benefit to the community at large, the conclusion is inescapable that the facility was conceived and has been maintained as a non-private organization which has neither the accoutrements nor the spirit of exclusivity.

For the foregoing reasons, Wheaton-Haven Recreation Association, Inc. should not be entitled to an exemption as a private club under Title II of the Civil Rights Act of 1964, and therefore the judgment below should be reversed.

Respectfully submitted,

PHILIP J. TIERNEY
General Counsel
State of Maryland
Commission on Human Relations

VALERIE L. OLSON
Staff Attorney

ELIZABETH TOCKMAN
Staff Attorney

Mount Vernon Building
701 St. Paul Street
Baltimore, Maryland 21202*
383-3687

Of Counsel:
GEORGE D. SOLTER
Chairman

June 1972

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